



January 22, 2020

**VIA USMAIL and EMAIL:**

Mr. James B. Gulliford  
United States Environmental Protection Agency, Region 7  
Office of the Regional Administrator  
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Lenexa, KS 66219  
Email: gulliford.jim@epa.gov

**RE: Diamond Vogel Superfund Site in Maurice, Iowa**

Dear Mr. Gulliford,

Thank you for your letter, dated December 3, 2019, concerning the Vogel Paint & Wax Company, Incorporated ("Diamond Vogel") Superfund site located in Maurice, Iowa. Your letter responds to mine, dated October 28, 2019, in which I wrote to Senators Joni Ernst and Chuck Grassley,<sup>1</sup> setting forth detailed concerns that I have with both the content of the Five-Year Review ("5YR") report and the process that EPA Region 7 ("EPA R7") used to develop the report. I also want to thank you for taking the time to consider my letter today. It is unclear to me why there is a disconnect between your description of the process and my experience of it. I'm hoping that today's letter will move us closer to a more consistent understanding of what has transpired so that the parties have the best opportunity to resolve the current issues and reach an agreement to work together transparently and cooperatively in the future. You are welcome to reach out to me directly, at your convenience, should you want to discuss this matter further.

For the sake of brevity, please see the attached letter, dated December 4, 2019, from Diamond Vogel's attorney to Mr. Sandeep Mehta, outlining in detail our concerns with the 5YR process and its contents. (*See Attachment A.*) My letter today will focus mostly on responding to the four major points in your December 3<sup>rd</sup> letter to me, specifically: (1) whether Diamond Vogel was given an opportunity to submit two sets of comments; (2) whether EPA R7 considered all comments that were submitted; (3) whether EPA is required to be transparent and cooperative during the 5YR process; and (4) whether the parties will be able to work together cooperatively and in good faith in the future to move the Site toward delisting from the National Priorities List ("NPL").

**Whether Diamond Vogel was given an opportunity to submit two sets of comments**

Your letter states that Diamond Vogel submitted two sets of comments to EPA R7 during the 5YR process, both of which were considered. This statement is not entirely accurate and is inconsistent with my experience throughout the 5YR process. As stated in my letter to Senator Ernst – and as detailed in Attachment A – EPA R7 only gave Diamond Vogel an opportunity to review and provide detailed comment on the first draft of the 5YR dated June 7, 2019. This first draft did not include any

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<sup>1</sup> Senator Grassley's office has yet to reach out to EPA in response to my letter.

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discussion of one of the most important issues brought forth in the 5YR review process – *i.e.*, potentially changing the groundwater Point of Compliance (“POC”). In fact, the process itself appears to have been conducted so as to limit Diamond Vogel’s meaningful participation on that issue.

Specifically, EPA R7 did not share with Diamond Vogel the second draft 5YR, dated June 28, 2019, which set forth EPA’s intention to consider changing the POC. Instead, on July 1, 2019, the Iowa Department of Natural Resources (“IDNR”) provided Diamond Vogel with a courtesy copy of the second draft 5YR. And, for some reason that remains unclear to me, Mr. Mehta purportedly criticized IDNR for sharing this second draft with us, despite the significant, substantive changes that EPA R7 was proposing in this second draft. Because of the time constraints Diamond Vogel was operating under when it received this second draft, the company was only able to quickly address the POC issue via letter dated July 9, 2019, *i.e.*, Diamond Vogel was unable to comment on the remainder of the second draft 5YR.

While I recognize that to some readers my concern about whether Diamond Vogel submitted one set of comments or two might seem like a distinction without a difference, that would miss the primary point of my concern. Simply stated, EPA R7’s behavior did not reflect a spirit of transparency, cooperation, and meaningful stakeholder participation, which should be the standard by which a regulatory agency’s actions are measured.

## Whether EPA R7 considered all comments that were submitted

Your letter states that all comments that EPA R7 received were considered prior to finalization of the 5YR. However, based on the contents of the published 5YR, this does not appear to be the case. There was at least one important technical error included in the published 5YR that was addressed in Diamond Vogel’s comments—EPA R7’s misapplication of the so-called 1% Rule. Misapplication of this Rule makes the Site appear more contaminated than it actually is.

Additionally, IDNR—the Site’s lead agency—submitted its comments via letter dated July 15, 2019, opposing changing the POC and indicating that there was an enforceable institutional control on-site. (*See* Attachment B.) Yet, despite IDNR’s comments, the published 5YR claims that there are no enforceable institutional controls on-site and the 5YR included language outlining EPA R7’s intent to change the POC.

## Whether EPA R7 was required to be transparent and cooperative in the 5YR review process

Your letter also states that five-year reviews are not explicitly governed by the 1990 Memorandum of Understanding (“MOU”) that IDNR and EPA entered into – a document that requires the parties to “work together to identify problems and to recommend solutions....” Regardless of what the MOU requires or does not require, according to the language of the 2001 OSWER that was cited in your letter, EPA was required to work with IDNR throughout the 5YR process to ensure concerns were resolved in a timely manner, and to the extent practicable, prior to finalizing the 5YR. Yet there

is abundant evidence that the Agency failed to do that and failed to achieve the standard of agency cooperation. EPA rushed through the 5YR review process, providing IDNR few opportunities for meaningful participation. There was no reason for this; there was plenty of time to share the third draft 5YR with IDNR before its publication. Had EPA shared the changes in the third draft prior to publication, IDNR would have been able to comment on, and otherwise address before they occurred, the errors that EPA R7 included in the published version of the 5YR – *i.e.*, changing the POC, EPA's assertion of a lack of institutional controls on-site, and the concern about returning the aquifer to beneficial use. Again, a more detailed discussion of these issues is set forth in Attachment A.

Furthermore, in the May 20, 2019 meeting between EPA R7, EPA Headquarters (“HQ”), and IDNR, a representative from EPA HQ told IDNR that EPA “wasn’t going to talk about IDNR’s past mistake regarding the POC established in the 2000 Explanation of Significant Differences (“ESD”).” This behavior is not only unprofessional, it openly defies the spirit of working together as outlined in the 2001 OSWER, effectively shutting down the ability of IDNR to meaningfully participate in the process. Moreover, the Agency’s assertion is factually and legally unfounded since EPA and IDNR had both approved the ESD that established the current POC.

## Whether the Parties will be able to work cooperatively and in good faith in the future

Hopefully, this letter has enabled you to better understand my perspective and experience, which are clearly very different from those set out in your letter. I am encouraged by your representation that EPA wants to engage in a transparent process moving forward, and I am pleased that you have requested that EPA R7, EPA HQ, and IDNR work together to resolve the POC issue and “enable progress toward site deletion.”

However, I would remiss if I did not address one final concern. Earlier this month, EPA R7 requested that Diamond Vogel withdraw its FOIA request (regarding the Point of Compliance) with the understanding that EPA would find a workable solution for EPA, IDNR, and Diamond Vogel regarding the POC issue. So, Diamond Vogel, in good faith, withdrew its FOIA application.<sup>2</sup> Your letter, however, could be read to suggest that changing the POC is a foregone conclusion, something which must be done in order for the Site to be deleted from the NPL. This potential inconsistency between what Diamond Vogel was told during the FOIA withdrawal conversation and what is written in your letter raises concerns about the process moving forward. Perhaps this is not the message that you had intended. As such, I look forward to your response.

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<sup>2</sup> Vogel submitted the FOIA request because Mr. Mehta wrote to Vogel on September 18, 2019 that “[t]he issue related to ‘Point of Compliance’ has been identified by the EPA in several previous conversations and emails.” IDNR requested the documentation to support Mr. Mehta’s claim. He never responded. Your letter seems to suggest that the POC issue only arose during and after the May 20, 2019 meeting between IDNR and EPA: “It was through this process... that EPA identified the existing groundwater point-of-compliance as a potential barrier to NPL deletion.” Your representation that the POC issue only arose after May 20, 2019 is consistent with our records.



Diamond Vogel has invested millions of dollars in cleaning up the Site and the company will continue to make the investments that are necessary to protect human health and the environment and to get the Site delisted from the NPL. The company would like to partner with both EPA and IDNR in meeting those objectives and would like to do so in a transparent and fair manner where all parties can participate in the process and in key discussions and can have any concerns that arise seriously considered, addressed, and resolved.

Sincerely,

A handwritten signature in cursive script that reads "Meika Vogel".

Meika Vogel  
Vice President, General Counsel

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